FILED
NOV 8 - 2006
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SUPREME COURT, U.S.

(2)

No. 05-1367

# In the Supreme Court of the United States

ILLINOIS, PETITIONER,

*v.*

JOHN L. SLOUP, RESPONDENT.

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois**

## REPLY IN SUPPORT OF THE PETITION

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## REPLY IN SUPPORT OF THE PETITION

There is a deep and enduring split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking a motorist questions about contraband or other matters unrelated to the purpose of the stop. Among federal courts of appeals and state courts of last resort, four require no independent justification for such questions; five prohibit such questions absent reasonable suspicion; and two require reasonable suspicion if the questions change the fundamental nature of the stop. Pet. 4-6. This split, which has been acknowledged by commentators and lower courts alike (*id.* 8), is ripe for resolution. So, too, is the related split over whether the *Terry* doctrine governs in this context. *Id.* 10-16.

Respondent does not deny that the two splits are genuine, important, mature, and worthy of review. He argues, however, that this case does not provide an ideal vehicle to resolve them. As shown below, respondent's arguments ignore fundamental certiorari principles and are otherwise meritless.

### I. Illinois Did Not Forfeit The Questions Presented.

Respondent's principal argument is forfeiture. See Opp. i, 7-13. The pertinent background is as follows. In *People v. Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003), the Illinois Supreme Court established a framework, based upon *Terry v. Ohio*, 392 U.S. 1 (1968), for analyzing Fourth Amendment challenges to police conduct during probable cause-based traffic stops. See Pet. 6-7, 10-11. The Illinois Appellate Court must follow Illinois Supreme Court precedent. See 14 *Ill. Law and Prac. Courts* § 84. Thus, when respondent appealed his conviction to the appellate court, Illinois forthrightly acknowledged that the court was bound by *Gonzalez*. See Pet. Ill. App. Br. 4 ("*this court* is controlled generally * * * by the framework set forth in *Gonzalez*.") (emphasis added). After the appellate court reversed respondent's conviction, Illinois urged

the state supreme court to revisit and overturn *Gonzalez*. See Opp. 6-7. Under Illinois law, that was the only appropriate forum for the State to press that argument. See *People v. Rosinski*, 351 Ill. App. 3d 459, 463, 813 N.E.2d 1078, 1082 (2004) ("After our supreme court has declared the law with respect to an issue, th[e] [appellate] court must follow that law, as only the supreme court has authority to overrule or modify its own decisions.") (internal quotation marks omitted).

According to respondent, Illinois forfeited the questions presented by failing to ask the state appellate court to overturn *Gonzalez*. Opp. 7-13. Respondent's argument misunderstands this Court's certiorari practice and Illinois forfeiture law.

With respect to certiorari practice, respondent ignores the difference between (i) a petitioner's "claim" and (ii) the "arguments" that a petitioner may make in this Court to support that claim. Both here and in the state appellate court, Illinois has advanced precisely the same claim: the police officer's conduct at the traffic stop did not violate the Fourth Amendment. Illinois may support that Fourth Amendment claim in this Court with arguments that it did not make in the appellate court — including that the officer needed no reasonable suspicion to question respondent about matters unrelated to the purpose of the stop, and that *Terry* does not govern the validity of those questions. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which

were advanced in the courts below upon a federal question there discussed."). As this Court has made clear, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534; accord, *e.g.*, *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Even if, as respondent appears to suggest (Opp. 9-10), Illinois's position on the appropriate Fourth Amendment framework for analyzing police conduct at traffic stops were properly characterized as a "claim" rather than an "argument," there still would be no forfeiture. When this matter was before the state appellate court, the Illinois Supreme Court had just decided *Gonzalez*. As noted above, Illinois law precluded the state appellate court from rejecting *Gonzalez*. Under circumstances such as these, where it would have been pointless to urge a lower court to jettison recent and binding precedent, there is no forfeiture for purposes of certiorari review. See, *e.g.*, *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002); *Lebron*, 513 U.S. at 379; *United States v. Williams*, 504 U.S. 36, 43-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). None of the cases cited by respondent (Opp. 9-10) holds the contrary or considers circumstances comparable to those here.

Respondent maintains that a different result is warranted here because this case arises from a state court. Opp. 9-13. Respondent's argument rests on the premise that the State's failure to challenge *Gonzalez* in the appellate court forfeited the issue for purposes of review in the state supreme court. *Id.* 7, 12-13. That premise is incorrect. As the Illinois Supreme Court explained:

> Where the trial court is reversed by the Appellate Court and the appellee in that court brings the case here for further review, he may raise any question properly presented by the record to sustain the judgment of the trial court, even though those questions were not raised or argued in the Appellate Court.

*People v. Donoho*, 204 Ill. 2d 159, 169, 788 N.E.2d 707, 714 (2003) (internal quotations omitted). This principle, which respondent neglects to mention, has been a fixture of Illinois law for at least a century. See, *e.g.*, *People v. Cunningham*, 212 Ill. 2d 274, 279, 818 N.E.2d 304, 307 (2004); *Mueller v. Elm Park Hotel Co.*, 391 Ill. 391, 398-399, 63 N.E.2d 365, 368-369 (1945); *Mulvihill v. Shaffer*, 297 Ill. 549, 554, 131 N.E. 125, 126-127 (1921); *Hartford Fire Ins. Co. v. Peterson*, 209 Ill. 112, 119, 70 N.E. 757, 760 (1904).

In this case, Illinois prevailed in the trial court and thus was the appellee in the appellate court. After losing the judgment in the appellate court, the State was entitled to raise any legal argument — including that *Gonzalez* should be reconsidered and overruled — in the state supreme court. See *People v. Love*, 199 Ill. 2d 269, 274, 769 N.E.2d 10, 14 (2002) ("the State may raise an issue before this court as an appellant which it did not raise before the appellate court as an appellee"). This is particularly true because, as noted above, it would have been pointless for Illinois to urge the state appellate court to reject *Gonzalez*. See *Rosinski*, 351 Ill. App. 3d at 463, 813 N.E.2d at 1082. Again, none of the Illinois precedents cited by respondent (Opp. 13) considers comparable circumstances or holds the contrary.

Accordingly, there was no forfeiture or waiver as a matter of Illinois law in state court. Nor has there been any forfeiture

for purposes of certiorari review. Both questions presented are properly before this Court.[1]

## II. Respondent's Other "Vehicle" Arguments Are Without Merit.

None of respondent's other "vehicle" arguments requires much discussion, and none has merit.

A. First, respondent suggests that certiorari is inappropriate because, even if this Court were to hold the officer's questions valid under the Fourth Amendment, the state courts might conclude otherwise under the state constitution. Opp. 11-12. The suggestion fails for two reasons. First, the Illinois Supreme Court recently held that the state constitution provides no greater protection than the Fourth Amendment with respect to police investigatory conduct at traffic stops. See *People v. Caballes*, 221 Ill. 2d 282, 314-332, 851 N.E.2d 26, 45-55

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[1] This Court implicitly reached the same conclusion in *Illinois v. Bartels*, 126 S. Ct. 320 (2006). The petition in *Bartels* presented questions materially identical to those presented here. See Pet. for Cert., No. 04-1066, at i. In opposing certiorari, Bartels contended that the State waived its arguments by failing to challenge *Gonzalez* in *either* the state appellate court *or* the state supreme court. See Br. in Opp., No. 04-1066, at 1-2, 7-8, 25. Illinois replied with arguments similar to those pressed here. See Reply in Supp. of Pet. for Cert., No. 04-1066, at 5-7. Necessarily rejecting Bartels's forfeiture argument, this Court granted the petition, vacated the appellate court's judgment, and remanded for reconsideration in light of *Illinois v. Caballes*, 543 U.S. 405 (2005). (Unlike the appellate court's judgment in *Bartels*, the appellate court's judgment here was issued after this Court decided *Caballes*.) The forfeiture argument here is even weaker than that in *Bartels*, for here Illinois urged the state supreme court (the only forum in which it could have pressed the argument) to overturn *Gonzalez*.

(2006). Second, and more important, if this Court were to resolve the Fourth Amendment issue in the State's favor, the state courts would be free on remand to consider respondent's arguments under the state constitution. See *id.* at 288, 851 N.E.2d at 31 (addressing canine sniff issue under the state constitution on remand from this Court's resolution of issue under Fourth Amendment).

B. Second, respondent maintains the record is unclear as to whether the traffic stop was based on (i) probable cause that a traffic violation occurred or (ii) reasonable suspicion that respondent was driving under the influence. Opp. 13-17. However, the judgment of the state appellate court — the court to which certiorari is sought — explicitly rests on the premise that respondent committed a traffic violation, which necessarily means that the stop was supported by probable cause. Pet. App. 7a; see *Whren v. United States*, 517 U.S. 806, 810 (1996) ("the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"). Accordingly, this matter comes to this Court as a probable cause case, not a reasonable suspicion case.

C. Third, respondent argues that this case presents thorny duration issues because it is unclear whether the traffic stop was impermissibly extended. Opp. 17-24. In so arguing, respondent forgets that the state appellate court relied exclusively upon the scope of the stop, not its duration, in holding that the officer's questions violated the Fourth Amendment. Pet. App. 12a ("Only 10 minutes passed between the initial stop and the search, but we need not consider whether Officer Opelt's request to search the car impermissibly prolonged the stop, because we conclude that the request to search violated defendant's fourth amendment rights by fundamentally changing the nature of the stop."). Consequently, this matter comes to this Court as a pure "scope of the stop" case, not a "duration of the stop" case, and thus

provides an appropriate vehicle to answer the questions presented. See *Illinois v. Caballes*, 543 U.S. at 407-408 (distinguishing scope issue from duration issue).[2]

D. Finally, respondent suggests that this Court should "allow[] the jurisprudence to develop in the courts below" before reviewing the questions presented. Opp. 25. But respondent does not and could not deny that the splits on both questions are deep and intractable, or that they are particularly intolerable in Illinois, where the federal and state courts apply different Fourth Amendment analyses to police questioning and other investigatory conduct at traffic stops. See Pet. 4-8. The lower courts have fully explicated their divergent views, and no conceivable benefit would come from further percolation.

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[2] Like respondent here, the respondent in *Caballes* opposed certiorari on the ground that the case involved duration issues. See Br. in Opp., No. 03-923, at 4-5, 8. Illinois replied in *Caballes*, as it does here, that the state court relied solely upon the scope of the stop, not its duration, in finding a Fourth Amendment violation. See Reply in Supp. of Pet. for Cert., No. 03-923, at 1-2. This Court granted certiorari, and then held that duration, having played no role in the decision below, did not affect analysis of whether the canine sniff impermissibly expanded the scope of the stop. See *Caballes*, 543 U.S. at 407-408.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2006